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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Review of the Commission's )  
Regulations Governing )  
Television Broadcasting )  
 )  
To: The Commission )

MM Docket No. 91-221

MOTION FOR EXPEDITED ACTION

(Ex Parte Communication)

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### SUMMARY OF ARGUMENT

Almost three years ago, the Commission Staff concluded that changes in FCC ownership rules were critically necessary to over-the-air television's continued ability to compete in the video programming marketplace. Since that time, marketplace developments have progressed at an unbelievably rapid pace. Absent Commission action relieving the broadcast television industry of the unique burdens of archaic ownership restrictions, the speed of marketplace growth seriously threatens broadcast television's ongoing participation in the information age.

The video marketplace is nothing if not dynamic and diverse. Ownership rules designed for a bygone era have no place in today's competitive video environment. Over-the-air television is faced by an ever-growing number of highly effective multichannel competitors which do not labor under similar ownership restrictions. Prompt Commission action to ease television ownership rules is critical to facilitating broadcast television's continued growth and full participation in today's telecommunications revolution.

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MOTION FOR EXPEDITED ACTION

A. H. Belo Corporation ["Belo"]<sup>1/</sup>, by its attorneys, here moves the Commission to expedite its action in the above-captioned rule making proceeding<sup>2/</sup> and issue a decision therein within 90 days.

Introduction

In its Notice of Proposed Rulemaking, the Commission sought comment on alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to and fully participate in the multichannel video marketplace. In particular, the Commission initiated a broad review of the rules governing the television broadcast industry's market structure, including national

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1/ Belo is the parent of the licensees of five television stations and thus has a tangible interest in proceedings affecting the Commission's rules which limit television station ownership.

2/ Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rule Making, 7 FCC Rcd 4111 (1992) ("Notice").

ownership restrictions, the duopoly rule, time brokerage agreements, radio-television cross ownership rules, the dual network rule, network ownership of stations, and the rule on the broadcast of programs of more than one network. The Notice was based on Commission recognition that the rapid changes in the video programming market had transformed these regulatory restrictions into unreasonable burdens which prevent broadcasters from competing effectively and from offering services that advance the public interest.<sup>3/</sup>

Notwithstanding the speed of the national video marketplace's recent expansion and the consequent immediate importance of eliminating needlessly restrictive ownership regulations, the Commission has not yet acted on the Notice. Instead, archaic ownership restrictions adopted and designed for a bygone media era continue to limit the television industry's full participation in the emerging video marketplace. Belo submits that expeditious resolution of this proceeding is imperative lest television broadcasters become second class citizens in the coming information age.

#### Background

In 1991, the FCC's Office of Plans and Policy issued a report that documented the rapidly evolving market

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<sup>3/</sup> Id. at 4113.

for video programming.<sup>4/</sup> The OPP Report found that new competition in broadcast services has resulted "in a plethora of new services and choices for video consumers," and that these new competitive forces are "affecting the ability of over-the-air television to contribute to a diverse and competitive video programming marketplace."<sup>5/</sup> Based on the OPP Report, the Commission issued a Notice of Inquiry<sup>6/</sup> seeking comment on possible relaxation of existing television ownership rules and related policies. After reviewing the comments filed in response to the Notice of Inquiry, the Commission adopted the Notice. Comments were filed on August 24, 1992; reply comments were filed on September 23, 1992. However, notwithstanding the acceleration of the developments which initially prompted this proceeding, the Commission has yet to issue a decision.

The Rapidity of Changes in the Video Marketplace  
Demands Expeditious Resolution of this Proceeding

In the three years since the OPP Report expressly recognized the dynamic nature of the video marketplace, changes in that marketplace have accelerated dramatically. Even though the television industry has long been fully

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4/ F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("OPP Report").

5/ Notice at 4111.

6/ Notice of Inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991).

mature, the number of television stations continues to increase -- there are 39 more stations now than when the OPP Report was issued.<sup>7/</sup> The growth in low power television stations, a newer video delivery vehicle, has been dramatic -- almost doubling from 895 to 1436 stations.<sup>8/</sup> By contrast, when the Commission adopted its duopoly rule in 1964,<sup>9/</sup> there were only 661 television stations and the low power service had not been authorized.<sup>10/</sup> And in 1985, when the Commission last revised its national television ownership limits,<sup>11/</sup> there were 1219 television stations and 354 operating stations in the newly authorized low power television service.<sup>12/</sup>

The growth in the number of stations has been exceeded by the expansion of the programming services they distribute. For example, when the Notice was issued, Fox was merely "...emerging as a robust competitor to existing

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<sup>7/</sup> FCC News Release, "Broadcast Station Totals as of June 30, 1991" (July 5, 1991); FCC News Release, "Broadcast Station Totals as of January 31, 1994" (February 11, 1994).

<sup>8/</sup> Id.

<sup>9/</sup> Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 2 RR 2d 1588 (1964).

<sup>10/</sup> See Federal Communications Commission, Annual Report for the Fiscal Year 1964 79.

<sup>11/</sup> Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74 (1985).

<sup>12/</sup> See Federal Communications Commission, Annual Report for the Fiscal Year 1985 21.

over-the-air networks when not long ago a fourth television broadcast network was unthinkable."<sup>13/</sup> Today, however, the Fox network covers 95% of the country.<sup>14/</sup> Additionally, Time Warner and Paramount Communications are racing to launch a fifth and sixth commercial television network.<sup>15/</sup> And specialized networks, such as the Home Shopping Network, Inc. and regional sports networks, are growing and provide an increasing range of programming alternatives.

Although cable television is likewise an essentially mature industry, it, too, continues to grow. At the beginning of 1990, there were approximately 10,704 cable systems serving approximately 51,000,000 subscribers; two years later, those numbers had grown to 11,395 systems serving 55,000,000 subscribers.<sup>16/</sup> The contrast with 1964 and 1985 is dramatic: in 1964 there were only 1,200 cable systems serving 1,085,000 subscribers, and even as late as

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<sup>13/</sup> Notice at 3.

<sup>14/</sup> Elizabeth Jensen, Time Warner Unit, Tribune Team Up, Plan Fifth Commercial TV Network, Wall St. J., Nov. 3, 1993, at B8.

<sup>15/</sup> Id.

<sup>16/</sup> Television & Cable Factbook, No. 61, Cable Volume (1993) at F-2 ("Cable Factbook"). See Bill Carter, Long Ratings Climb Ends for Cable Television, N.Y. Times, Nov. 15, 1993, at D10.



1985, there were only 6,600 systems serving 32,000,000 subscribers.<sup>17/</sup>

This growth of cable systems has been matched or exceeded by the growth in cable programming services. Cable television viewership ratings have increased sharply since the OPP Report,<sup>18/</sup> and new cable channels are constantly being launched.<sup>19/</sup> Cable systems, eager to market an increased variety of cable programming services and to add to their multiple revenue streams, have expanded their channel capacity to the point where as of November 1, 1992, almost 95% of cable subscribers were served by cable systems having at least a 30-channel capacity.<sup>20/</sup>

Telephone companies are also entering the video programming market, opening up an entirely new source of competition for over-the-air television. Pursuant to the Commission's video dialtone rules,<sup>21/</sup> telephone companies

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17/ Cable Factbook at F-2.

18/ Carter, supra note 15.

19/ Recent cable channel launches include the Television Food Network, F/X, Cable Health Club, and the Game Show Channel. See Kevin Goldman, New Cable Channel Will Talk Turkey -- and Leftovers, Wall St. J., Nov. 26, 1993, at B1; Jefferson Graham, Fox, Health Club join cable universe, USA Today, Dec. 2, 1993, at D1.

20/ Cable Factbook at F-3.

21/ Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd (continued...)

have initiated transmission of video programming over telephone wires.<sup>22/</sup> Bell Atlantic has already announced its intentions to offer television service over its telephone lines to approximately 250,000 customers in Maryland and Virginia by the end of 1994,<sup>23/</sup> and Ameritech plans to bring a video-capable network to 6 million customers, half of Ameritech's customer base, by the year 2000.<sup>24/</sup> Pacific Bell has sought authorization to offer video dialtone services throughout California.<sup>25/</sup>

Direct broadcast satellite technology has also emerged since the Notice. At least three firms, Hughes

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21/ (...continued)  
5781 (1992), pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, Nos. 92-1404, et al. (D.C. Cir. Sept. 9, 1992).

22/ The Commission has thus far authorized four video dialtone trials. The Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993); U S West Communications, Inc., FCC 93-520 (December 22, 1993); New York Telephone Company, 8 FCC Rcd 4325 (1993); The Southern New England Telephone Company, FCC 93-473 (November 12, 1993). There are a number of applications for permanent video dialtone authority pending.

23/ Kent Gibbons, Movies planned for local phone lines, Wash. Times, Dec. 17, 1993, at B11; Harry A. Jessell, BA hopes to launch video dialtone in fall, Broadcasting & Cable, Jan. 10, 1994, at 66; see File No. W-P-C 6912.

24/ See, e.g., Ameritech Plans Video-Ready Network to Reach 6 Million by Year 2000, Communications Daily, Jan. 28, 1994, at 1; Mark Robichaux, Firm Says It Can Send 10 TV Channels Over Phone Wires; Some Are Skeptical, Wall St. J., Jan. 27, 1994, at B8.

25/ File Nos. W-P-C 6913-6916.

Communication's DirecTV, Primestar, and Hubbard Broadcasting's United States Satellite Broadcasting, plan to transmit as many as 150 television channels to owners of 18-inch satellite dishes. The president of DirecTV, Eddy Hartenstein, has said that his company plans to capture 10 million homes (10% of the television market) by the year 2000.<sup>26/</sup>

Pending Congressional action could also radically change the video programming market. For example, H.R. 3636, a bipartisan bill from the House Telecommunications and Finance Subcommittee, allows local exchange carriers (the Bell telephone companies) to provide video programming in their telephone service areas.<sup>27/</sup> The Clinton Administration is already on record as supporting H.R. 3636,<sup>28/</sup> and its keen interest in shaping the coming "national information infrastructure" makes legislative incentives for marketplace growth likely.<sup>29/</sup>

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<sup>26/</sup> Edmund L. Andrews, Betting Big on Small-Dish TV, N.Y. Times, Dec. 15, 1993, at D1.

<sup>27/</sup> See 139 Cong. Rec. H10911 (daily ed. Nov. 22, 1993).

<sup>28/</sup> Kent Gibbons, White House backs Bells' long-distance cable entry, Wash. Times, Jan. 27, 1994, at B8. The Bell expansion bill was written by Rep. Jack Brooks and Rep. John Dingell and would allow the Bell companies to carry long-distance calls, transmit cable television programming, and make telephone equipment. Id.

<sup>29/</sup> See Gore Sees Greatest Benefits to Schools from Networks, Communications Daily, Jan. 18, 1994, at 3 (Vice (continued...))

The Commission Must Act Promptly in this Proceeding  
To Permit Full Television Broadcast Station Participation  
In the Emerging Video Marketplace

The rapid and continuing expansion of the video marketplace outlined above is not new news to the Commission. It has repeatedly cited such growth in support of its actions, and has specifically relied upon it as the basis for changes in its ownership restrictions.<sup>30/</sup> The dramatic, continuing video revolution also demands action -- prompt action -- in this proceeding.

The Notice recognized the enormous changes in the video marketplace and the consequent need to revise

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29/ (...continued)

President Al Gore participating in a live on-line conference on CompuServe); Brown Links Universal Service With Economics, Communications Daily, Jan. 7, 1994, at 1 (Commerce Secretary Ron Brown speaking at the Museum of Television and Radio); Industry Executives Meet With Gore on Telecommunications Policy, Communications Daily, Jan. 6, 1994, at 2 (Gore and Brown meet with telecommunications representatives); Gore Outlines Clinton's Telecommunications Goals, Communications Daily, Dec. 22, 1993, at 1 (Gore speaking at the National Press Club).

30/ For example, the Commission has stated that "[w]e observed . . . that the number of non-radio outlets competing with radio stations for audiences and advertising revenue has risen substantially. . . ." Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC Rcd 6387, 6387 (1992). See also Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755, 2756 (1992) (citing the fragmented structure of the broadcasting industry and the increasing number of media outlets). Congress, too, has recognized the tremendous growth of the video marketplace to support legislation. See, e.g., Mary Lu Carnevale, Senators Plan Bill Covering Communication -- Bipartisan Effort Is Seeking To Ensure Public Access And Tear Down Barriers, Wall St. J., Feb. 3, 1993, at A3.

ownership restrictions designed for a completely different, no longer extant, regulatory environment. The Commission has voluminous comments before it which provide a more than adequate basis for decision at least to relax its current television duopoly rule. Those comments filed in the response to the Notice overwhelmingly confirm the need for ownership restrictions which reflect contemporary marketplace realities, not those of ten to thirty years ago. The matter is thus ripe for a decision to modify the television ownership rules as the Commission has proposed.

The dynamics of today's video marketplace demand prompt action to relax ownership restrictions such as the television duopoly rule which, as the comments filed herein overwhelmingly agree, have lost their policy justification. The contemporary video marketplace is characterized by nothing if not diversity and economic competition. In such circumstances, restrictive ownership regulations designed to foster diversity and economic competition are superfluous and unfair to over-the-air television.

Recent ownership actions confirm the inequity of continuing to burden the television industry with outdated ownership limitations while its competitors flourish without similar restrictions. The Commission has moved to permit

expanded common ownership of radio stations.<sup>31/</sup> The Commission has declined to impose significant limits on ownership of cable television systems or the number of subscribers which a cable system may serve in a community or in a region.<sup>32/</sup> It has opened up cable television ownership to the national television networks.<sup>33/</sup> It opened the way for telephone company provision of video dialtone service,<sup>34/</sup> and at least one court has indicated that telephone companies may also provide video programming to their subscribers.<sup>35/</sup> Even Congress is liberalizing ownership restrictions: it authorized the Commission to waive its radio-newspaper cross-ownership rule,<sup>36/</sup> and H.R. 3636 would effectively eliminate the telephone company-cable cross-ownership rule as well as direct the Commission to

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31/ Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755 (1992).

32/ Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd 3359 (1993).

33/ Amendment of Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156 (1992).

34/ See, n.22, supra.

35/ The Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), appeal docketed, Nos. 93-2340 and 93-2341 (4th Cir. Oct. 15, 1993).

36/ Pub.L. No. 103-121, enacted October 27, 1993; see H.Rep. No. 103-293, Conference Report to H.R. 2519 (October 14, 1993).

conduct a review of its local and national ownership rules and eliminate those that (like the television ownership rules at issue here) are unnecessary to preserve diversity.

The current restrictive television ownership regulations impair the ability of over-the-air television broadcasters to compete on an equal basis with other video program providers which are not subject to these restrictions. As their competitors continue to gain alternative and expanded means of providing programming to subscribers, television stations, limited to one one-lane road to the home, will be left abandoned beside the information superhighway unless they are free to optimize the economies of scale and operational efficiencies which more liberal ownership regulations would permit.

For example, enhanced common ownership of television stations with overlapping service contours, even to the minimal degree proposed in the Notice, could enable television stations to combine news operations to facilitate more extensive and detailed news coverage. It could permit creation of regional television news and programming networks. It could permit production of regional public service programming. It could permit stations to bid more competitively for the rights to sports and other events of particular regional interest. It could, in other words, provide television stations with additional competitive

capabilities which will be necessary to survival in the increasingly competitive video marketplace. But unless the Commission acts swiftly to relieve the regulatory burden of its ownership rules, the marketplace will have advanced to the point that television broadcasters have become second class citizens in the coming information age.

Prompt Commission Action is Mandated by Federal Law

Expedited action here is in any event mandated by federal law. Under the Administrative Procedure Act, agencies must conclude matters presented to them "within a reasonable time,"<sup>37/</sup> and the United States Court of Appeals for the District of Columbia has stated that a "rule of reason" applies to how long the FCC may take to make decisions.<sup>38/</sup> The Commission's delay in acting on the Notice is unreasonable because of the adverse consequences to television broadcasters and the public if the ownership rules' regulatory burden is not lifted.

Under the "rule of reason" test, courts look at a number of factors to determine whether an agency is unreasonably delaying action. Among the factors are the time the agency has had to act and the nature and extent of

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<sup>37/</sup> 5 U.S.C. § 555(b).

<sup>38/</sup> See MCI Telecommunications Co. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980); see also Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).



the interests prejudiced by the delay.<sup>39/</sup> In this case, the delay is approaching 18 months, an unreasonable amount of time in light of the rapid pace of the marketplace developments described herein.

Further, both television broadcasters and the general public will be harmed by this delay. Each day that television stations must operate pursuant to ownership restrictions that do not similarly constrain their competitors weakens free over-the-air television's ability to fully compete in the video marketplace. This, in turn, weakens stations' ability to maximize service to the public. If broadcasters' place in the video marketplace continues to decline, the general public will be denied access to free, quality programming. Therefore, the Commission's delay in acting on the Notice is unreasonable in that it threatens to jeopardize the essence of the very purpose for which the Commission was formed --

... to make available ... to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service ...

47 U.S.C. § 151.

#### Conclusion

The public interest will suffer if broadcasters cannot effectively compete for a place on the information

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<sup>39/</sup> 750 F.2d at 80.

superhighway. A.H. Belo Corporation therefore urges the Commission to address the issues raised by the Notice by expediting action in this rulemaking and issuing a decision herein within 90 days: the Commission must lift the regulatory burden of its current television ownership rules in order to allow all of the people of the United States continued access to a robust broadcasting industry.

Respectfully submitted,

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February 17, 1994

CERTIFICATE OF SERVICE

This will certify that two copies of the foregoing "Motion for Expedited Action" have been delivered on February 17, 1994, to Hon. William F. Caton, Acting Secretary, Federal Communications Commission, Washington, D.C. 20554 for inclusion in the public record of MM Docket No. 91-221.

Constance A. Randolph